

STATE OF MICHIGAN
COURT OF APPEALS

ALISHA WOOD, Personal Representative of the
Estate of BRADLEY WOOD, Deceased,

Plaintiff-Appellant,

v

ALFRED K. BEDIAKO, M.D.; HILLSDALE
OBSTETRICS & GYNECOLOGY, P.C.; and
HILLSDALE COMMUNITY HEALTH
CENTER,

Defendants-Appellees.

FOR PUBLICATION
October 26, 2006
9:00 a.m.

No. 267190
Hillsdale Circuit Court
LC No. 04-000512-NH

Official Reported Version

Before: Zahra, P.J., and Neff and Owens, JJ.

OWENS, J.

In this medical malpractice action, plaintiff appeals as of right an order granting defendants Alfred K. Bediako; Hillsdale Obstetrics & Gynecology, P.C.; and Hillsdale Community Health Center (HCHC) summary disposition on the ground that plaintiff failed to file a valid affidavit of merit with her complaint and her action was therefore time-barred. We reverse and remand for further proceedings consistent with this opinion.

This case arose from the stillbirth of plaintiff's son Bradley Wood on June 6, 2003. Plaintiff was appointed personal representative on September 2, 2003. The complaint was served on defendants on August 4, 2004, with an attached affidavit of merit signed by a physician who was board-certified in obstetrics and gynecology. The affidavit was one of three originals prepared by plaintiff's counsel on July 22, 2004. Of these three originals, for reasons unknown and assumed to be clerical error, only two were notarized. The one unnotarized affidavit was attached to the complaint filed with the court, and the two notarized affidavits were kept in the files of plaintiff's counsel. Defendants' answers to the complaint included the affirmative defense of lack of a proper affidavit of merit. HCHC moved for summary disposition on July 11, 2005, on a basis not relevant to the instant appeal. Plaintiff's response contained a copy of one of the two original notarized affidavits as an exhibit.

On October 14, 2005, Bediako and Hillsdale Obstetrics (collectively referred to in this opinion as "Bediako") moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10) on the ground that the unnotarized affidavit of merit attached to plaintiff's complaint

failed to meet the statutory requirements of MCL 600.2912d. Bediako argued that the defective affidavit did not toll the period of limitations and that plaintiff's claim was barred because it had been more than two years since letters of authority were issued. HCHC concurred in Bediako's motion, noting that summary disposition was also appropriate under MCR 2.116(C)(1) and (C)(4).¹ Plaintiff responded by urging the trial court to invoke the doctrine of equitable tolling in reliance on this Court's decision in *Ward v Rooney-Gandy*, 265 Mich App 515, 520; 696 NW2d 64 (2005), rev'd 474 Mich 917 (2005).² At the outset of the motion hearing, the trial court noted that *Ward* had been reversed. Plaintiff argued that a notarized affidavit filed with the court before the expiration of the period of limitations "serendipitously" cured the defect and tolled the period. Plaintiff distinguished the instant action from that in *Ward* because the affidavit that was attached in *Ward* was grossly nonconforming, while the instant affidavit was merely "technically deficient."³

The trial court cited the standards of review for summary disposition motions brought pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). It implicitly granted summary disposition pursuant to MCR 2.116(C)(7) on the ground that the affidavit attached to the complaint was not notarized. It did not address the effect of plaintiff's subsequent serendipitous filing of a notarized affidavit within the period of limitations. Plaintiff argues that the failure to address the effect of the subsequent filing was error. We agree.

In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court "must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001), quoting *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). The interpretation and application of a statute of limitations presents a question of law, which is reviewed de novo. *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). If the language of an applicable statute is clear, no further analysis is necessary or allowed. *Id.* at 683.

The period of limitations for a medical malpractice action is two years. MCL 600.5805(6). In a civil action, generally, the period of limitations is tolled and the action is commenced when a complaint is filed. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), citing MCR 2.101(B) and MCL 600.5856. However, to commence a medical malpractice action, and thus toll the period of limitations, a plaintiff must file both a complaint

¹ MCR 2.116(C)(1) and (C)(4) specify lack of personal and subject-matter jurisdiction, respectively, as grounds for summary disposition.

² In *Ward*, *supra* at 520, this Court invoked the doctrine of equitable tolling when the plaintiff's counsel accidentally attached an affidavit of merit for another case to the complaint.

³ Plaintiff also challenged the timing of defendants' motions because they were filed after the deadline for dispositive motions, and argued that defendants' affirmative defense did not comply with the requirements of MCR 2.113(F)(1).

and an affidavit of merit. MCR 2.112(L); MCL 600.2912d(1). If a complaint *and* an affidavit of merit are not filed, the period of limitations is not tolled. *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002). "To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000). Hence, the unnotarized affidavit filed with the complaint in this case was not valid.

When a complaint is filed in a medical malpractice action without an affidavit of merit, the action is subject to dismissal without prejudice before the period of limitations has run. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). There is no indication in the record that defendants sought dismissal on this ground before the running of the period of limitations. See MCR 2.116(C)(8); MCR 2.504(B)(1). In *VandenBerg v VandenBerg*, 231 Mich App 497, 498, 502; 586 NW2d 570 (1998), this Court found that MCL 600.2912d did not require dismissal for noncompliance when the plaintiff did not obtain an affidavit of merit until 2 1/2 months after she filed her medical malpractice complaint, but a copy of the affidavit was served with the summons and complaint.⁴ In doing so, it noted that although the statute plainly stated that an affidavit of merit "shall" be filed with a complaint, the statute failed to address the consequences of not filing the affidavit at the time of the complaint. *Id.* at 500. It further noted that when the Legislature amended the statute in 1993, it eliminated the provision that allowed the trial court to dismiss the complaint if the complaint failed to meet statutory requirements. *Id.* at 501.

Moreover, the Court recognized that the defendants were not prejudiced because "they had access to the affidavit of merit from the moment they received the complaint." *Id.* at 503. We note here that although defendants did not have a valid affidavit, they did have notice of plaintiff's theory of the case from the moment they received the complaint. Moreover, the trial court found that the unnotarized affidavit otherwise met the legal and medical requirements of the statute, and defendants did not challenge its sufficiency on these grounds. And, importantly,

⁴ Additionally, this Court has considered the validity of affidavits not filed with complaints in other cases. In *Mouradian v Goldberg*, 256 Mich App 566, 571; 664 NW2d 805 (2003), two acts of malpractice were alleged, one for which the limitations period expired on November 13, 2000, and a second for which the limitations period expired on December 11, 2000. The plaintiffs filed a complaint for both acts on November 13, 2000, without an affidavit of merit. *Id.* at 568. The plaintiffs subsequently filed an affidavit of merit separately, on December 8, 2000. *Id.* Although it ultimately held that the affidavit did not toll the period of limitations because it was grossly nonconforming, this Court determined that, regarding the second act alleged, the separate filing, "on its face, . . . 'completed'" the filing of the complaint before the limitations period expired on December 11, 2000. *Id.* at 572-574, quoting *Scarsella, supra* at 550. In *Holmes, supra* at 710, the plaintiff filed an unsworn affidavit of merit several months after his complaint, before the expiration of the period of limitations. This Court examined the plaintiff's subsequently filed affidavit of merit for validity, even though it was filed after the complaint. *Id.* at 711.

plaintiff remedied the lack of notarization when she later filed a notarized copy within the period of limitations. Hence, we conclude that defendants were not prejudiced by the delayed filing of the notarized affidavit. See *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004) (observing that actual prejudice is not caused by delay alone; rather, it occurs when an amendment to a pleading would deny the opposing party a fair trial).

In *Scarsella, supra* at 550 n 1, our Supreme Court declined to overrule *Vandenberg*. Instead, it found *Vandenberg* factually and legally distinguishable because *Vandenberg* did not involve a statute of limitations issue. Hence, while the filing of a complaint without an affidavit of merit does not toll the period of limitations, and the subsequent filing of an affidavit after the limitations period has run does not relate back to the original filing, *id.* at 549-550, the subsequent filing of an affidavit before the limitations period has run will operate to toll the limitations period and commence the suit unless a defendant moves for dismissal or can demonstrate prejudice. *Dorris, supra* at 47; *Vandenberg, supra* at 502.

Because a trial court is required to consider all admissible evidence then filed in the action when deciding a summary disposition motion pursuant to MCR 2.116(C)(7) and (10), see MCR 2.116(G)(5), we conclude that the court erred in failing to consider the subsequently filed notarized affidavit when it granted defendants summary disposition on the ground that the period of limitations was not tolled.

Reversed and remanded for further proceedings consistent with this opinion.

Neff, J., concurred.

/s/ Donald S. Owens

/s/ Janet T. Neff